

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY ROSS)	
Claimant)	
VS.)	
)	Docket No. 237,469
PRECISION MACHINING, INC.)	
Respondent)	
AND)	
)	
HARTFORD FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the March 15, 1999 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The sole issue raised by respondent in its brief to the Appeals Board is whether claimant gave timely notice of his alleged injury. The Administrative Law Judge found claimant was injured beginning September 1, 1998 and continuing each and every working day thereafter through the last day worked of September 30, 1998. Respondent admits claimant sustained a work-related injury on September 1, 1998. Respondent further admits that claimant gave respondent notice of a work-related injury on September 28, 1998. Respondent contends this notice was not within 10 days of the accident date and there was no just cause for claimant's failure to give notice so as to extend the time to 75 days.¹ Hence, notice was not timely and claimant's claim for workers compensation benefits should be barred. Based upon the foregoing argument, date of accident is also an issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

- (1) Claimant injured his low back while working for respondent on September 1, 1998.
- (2) After a few days claimant was walking with a noticeable limp and Greg Martin, claimant's supervisor, asked claimant if something was wrong with his leg. Claimant

¹ K.S.A. 44-520.

responded that he hurt it lifting. Claimant did not indicate whether his injury occurred at work.

(3) Claimant first sought medical treatment for his low back pain on September 15, 1998 with Dr. Joel T. Weigand at the Sumner County Family Care Center, P.A., in Wellington, Kansas.

(4) On September 28, 1998 claimant went to the Emergency Room at the Sumner County Regional Medical Center. He informed hospital personnel that he injured his back approximately two or three weeks previously but now it was worse. As instructed, he also went to a follow-up appointment at the doctor's office at the Family Care Center later that day.

(5) Also on September 28, 1998 claimant told Mr. Martin that he injured his back at work.

(6) Claimant again sought treatment at the Family Care Center and with Dr. Ronald Davis at Preferred Medical Associates on September 30, 1998. Claimant gave a history of injuring his lower back lifting parts at work weighing as much as 250 pounds. An MRI of claimant's lumbar spine performed September 30, 1998 revealed a large right L5-S1 herniated disc and he was referred by Dr. Davis to Dr. Jacob Amrani of Advanced Orthopaedic Associates on October 1, 1998.

(7) Claimant first testified that he injured his back on September 1, 1998. He subsequently added that his back continued to get worse and that he suffered a new injury or aggravation on his last day of work, on or about September 29, 1998.

(8) In support of respondent's argument that there was only a single accident date, respondent points out that when claimant was examined at the Family Care Center and at the Preferred Medical Associates on September 30, 1998 he did not mention any new injury. Similarly, when claimant filed his application for preliminary hearing on October 19, 1998, he only alleged an injury date of September 1, 1998. There was no mention of a series of accidents, aggravations or new accidental injuries at the November 12, 1998 preliminary hearing.² Respondent argues that this testimony first occurred at the January 6, 1999 preliminary hearing. Claimant had initially relied upon respondent's failure to post a form 40 in a prominent place in support of his testimony that he was not aware of any 10-day notice requirement. Only after it was established that there were form 40 forms posted throughout its facilities did claimant testify to an aggravation of his original work-related injury, according to respondent. Claimant, however, continues to dispute that a form 40 was prominently posted at the work place. Claimant also does not recall being told or reading in the

² Claimant, in his brief, alleges he filed an amended form E-1 alleging a back injury commencing September 1, 1998 and continuing each and every working day thereafter through the last day worked. A review of the Division's files reveals no such amended form E-1. But claimant did make an oral request to amend the alleged date of accident at the November 12, 1998 preliminary hearing. (Transcript of proceedings, p.9.)

employee policy manual or in posted memos that employees were to report all work injuries within 24 hours.

(9) At the initial November 12, 1998 preliminary hearing, however, when asked why he waited until September 15, 1998 to seek medical attention, claimant responded that he thought he would get better but instead he "seemed to get worse and worse" and that he eventually lost all the feeling in his right leg. When asked to elaborate on this earlier statement, claimant testified on January 6, 1999 that his normal work duties were quite strenuous and, on the day before his last day at work he was required to manually change out a 250 pound fixture. These activities made his back and right leg pain worse and also caused a new symptom of numbness down his right leg and into his foot..

(10) The Workers Compensation Act places the burden of proof on the claimant to establish by a preponderance of the credible evidence the various conditions on which the claimant's right to compensation depends.³

(11) It is uncontroverted that claimant's work duties remained the same following his September 1, 1998 accident. The medical records introduced as exhibits to the November 12, 1998 preliminary hearing transcript support claimant's testimony that his symptoms increased. Based upon the record presented to date, the Appeals Board finds claimant has established that his work activities after September 1, 1998 aggravated his low back injury. Accordingly, accidental injury by a series of traumas up through the last day worked has been proven and the September 28, 1998 notice was timely.⁴ Furthermore, when claimant spoke to the doctors and his supervisor, Greg Martin, on September 28, 1998 he told them that his back had gotten considerably worse.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated March 15, 1999, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
P. Kelly Donley, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge

³ K.S.A. 1998 Supp. 44-501(a) and K.S.A. 1998 Supp. 44-508(g).

⁴ See, Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); Alberty v. Excel Corporation, 24 Kan. App. 2d 678, 951 P.2d 967, rev. denied 264 Kan. ____ (1998).

ANTHONY ROSS

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Philip S. Harness, Director